Resolving the false conflict created by Petitioner will do nothing to enhance the integrity of commerce or serve the purposes of the federal antitrust laws. Holding that false statements in the marketplace are *per se* illegal under Section 1 of the Sherman Act, as Petitioner has argued throughout this litigation (Pet. App. at 104a-109a, 119a n.46), could subject competitors to criminal prosecution and liability for treble damages and counsel fees for engaging in commercial speech that allegedly includes even a single factually-erroneous statement. Such a holding will not enhance commerce. Rather, it will serve only to chill procompetitive speech and advertising and subvert a free and open economic marketplace.

Expanding the scope of *per se* actionable conduct under Section 1, as Petitioner has argued, is in any event unnecessary. Congress has enacted both Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a),[2] and the Federal Trade Commission Act, 15 U.S.C. § 5 (as amended), to protect against injury caused by intentional false advertising. State law further protects against injury caused by a competitor's tortious misconduct, including intentionally false statements to consumers.

---

2 *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776-786 (1992) (Stevens, J., concurring) (discussing the purpose and development of Section 43(a) of the Lanham Act), *reh'g denied*, 505 U.S. 1244 (1992).

I. THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT A CONSPIRACY TO DISPARAGE A COMPETITOR'S PRODUCT TO CONSUMERS IS NOT, WITHOUT MORE, IN RESTRAINT OF TRADE

The Third Circuit did not hold that intentionally false statements can never violate the antitrust laws, as Petitioner claims. Rather, the Third Circuit correctly held that disparaging statements made to consumers about a competitor's product are not, without more, in "restraint of trade." Stated another way, the disparagement of a competitor's product to consumers does not restrain trade where the plaintiff was in no way excluded from the market and was free to tout its product to consumers, and where those consumers were free to decide what product to purchase unconstrained by any restrictions in supply or coercive conduct. As the Third Circuit stated, "without a restraint, there is no restraint of trade." Pet. App. at 13a (quoting *Shachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989) (Easterbrook, J.)).

Petitioner's antitrust claim under Section 1 of the Sherman Act is based upon allegations that the Respondents criticized the safety of HDPE toilet partitions. However, as the Third Circuit stated, no factual material was presented by Petitioner to show that criticism was accompanied by any coercion or threats of coercion. *See* Pet. App. at 13a-14a. Quoting the Fifth Circuit's decision in *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518, 524-525 (5th Cir. 1999), the Third Circuit correctly observed that arguments made to potential customers "may have been wrong, misleading, or debatable. But they are all arguments on the merits, indicative of competition on the merits....Without a showing of some other factor, we can assume that a consumer will make his decision only on the merits." Pet. App. at 14a. Indeed, far from being anticompetitive,

"jockeying over specifications...is a valid form of competition." Pet. App. at 15a (quoting *Stearns*, 170 F.3d at 526).

Simply stated, Petitioner was not excluded from the marketplace. Petitioner remained "free to tout its product to the specifiers and remain[ed] equally free to reassure them that its partitions are superior to Bobrick's partitions and to prove Bobrick wrong about the flammability of HDPE partitions." Pet. App. at 14a-15a. Nor were consumers constrained from purchasing HDPE partitions. "Unlike cases where the alleged exclusionary conduct leaves the consumer with no input whatever, the decision to specify 'was always ultimately in the hands of the consumer.'" *Id.* (quoting *Stearns*, 170 F.3d at 525). Observing further that there was no evidence that Petitioner was prevented from presenting its arguments at the specifications phase of government bidding, the Third Circuit said "the plaintiff was not excluded from competition." *Id.* In the absence of some type of constraint upon consumers to follow the Respondents' recommendations, Petitioner was not excluded from the market because it "was still free to sell its product and consumers were free to buy them." Pet. App. at 16a.

In *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989), an analogous decision by Judge Easterbrook quoted extensively by the Third Circuit, plaintiffs were ophthalmologists who performed a surgical procedure, radial keratotomy, labeled "experimental" by the National Advisory Eye Council. The American Academy of Ophthalmology endorsed the Council's position and issued a press release advising physicians and patients not to use the procedure until further research had been completed. Plaintiffs alleged that the press release was the product of a conspiracy to restrain trade. In rejecting the plaintiffs' antitrust claims, Judge Easterbrook held that there was no

restraint of trade. "The Academy's declaration affected only the demand side of the market, and then only appealing to consumers' (and third-party payors') better judgment. If such statement should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas." *Id.* at 400. In discussing that case, the Third Circuit specifically noted the absence of any enforcement device there, like here, which operated to restrain trade. "None of the plaintiffs was prevented from doing the procedure and none was sanctioned for performing it." Pet. App. at 16a.

Finally, the Third Circuit distinguished *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), relied upon heavily by Petitioner, reasoning that the present case involved no standard-setting body capable of setting, adopting or enforcing any industry standards. Pet. App. at 17a-18a. "The government officials making the decision to specify materials were ... susceptible to lobbying from all competitors in the toilet partition industry." In the absence of any enforcement device, the defendants' "campaign of persuasion" did not restrain trade. *Id.* Petitioner has not appealed that issue.

Furthermore, Petitioner's assertion that intentional product disparagement is a *per se* violation of the antitrust laws (Pet. App. at 104a-109a, 119a n.46) runs afoul of this Court's admonition that courts should be mindful of the chilling effect antitrust liability can have on permissible procompetitive conduct. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("mistaken inferences in cases such as this one [predatory-pricing] are especially costly, because they chill the very conduct the antitrust laws are designed to protect."); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984) ("Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came

about 'in response to' complaints, could deter or penalize perfectly legitimate conduct."), *reh'g denied*, 466 U.S. 994 (1984). Criminalizing commercial speech by imposing *per se* antitrust liability, as argued by Petitioner, would only serve to chill and frustrate procompetitive promotional conduct.

Subjecting competitors to antitrust liability for engaging in commercial speech, even intentionally false commercial speech, will not promote the policies of the antitrust laws. The antitrust laws were passed to protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)), *reh'g denied*, 509 U.S. 940 (1993). As Judge Easterbrook cogently explained in *Sanderson v. Culligan International Co.*, 415 F.3d 620 (7th Cir. 2005):

> The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producer thinks the competition "fair". Much competition is unfair, or at least ungentlemanly; it is designed to take sales away from one's rivals. There is no obligation to be kindly or cooperative toward other producers. Some laws, including the Lanham Act, condemn particular tactics deemed "unfair"; the Sherman Act is not among these laws.

> Antitrust law condemns practices that drive up prices by curtailing output. False statements about a rival's goods do not curtail output in either the short or the long run. They just set the stage for competition in a different venue: the advertising market. *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989), another antitrust case based on a supposed commercial falsehood, makes this point forcefully.
>
> We observed:
>
> Warfare among suppliers and their different products *is* competition. Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law. Unless one group of suppliers diminishes another's ability to peddle its wares (technically, reduces rivals' elasticity of supply), there is not even the beginning of an antitrust case, no reason to investigate further to determine whether the restraint is "reasonable".

415 F.2d at 623 (citations omitted and emphasis added).

By urging this Court to expand the range of *per se* conduct actionable under the antitrust laws, Petitioner seeks to transform the Sherman Act into a law of unfair competition which would provide a remedy for all manner of business torts. American commerce needs no such further remedy, as such conduct is already prohibited by the 1988 amendments to the Lanham Act and the 1938 amendments to the FTC Act, as well as by state law, none of

which requires a showing of restraint of trade. *See* 15 U.S.C. § 5 (as amended) and § 1125(a).

II. NO CONFLICT EXISTS AMONG THE CIRCUITS ON WHETHER INTENTIONALLY FALSE PRODUCT DISPARAGEMENT MADE TO CONSUMERS IS IN RESTRAINT OF TRADE IN THE ABSENCE OF ANY COERCIVE CONDUCT

The principal reason advanced by Petitioner for granting *certiorari* is that there is a conflict among the Circuits regarding whether the intentionally false disparagement of a competitor's product can constitute a violation of Section 1 of the Sherman Act. Petitioner asserts that the Third, Fifth and Seventh Circuits hold that as a matter of law such false statements cannot be deemed a restraint of trade, and the District of Columbia, Second, Sixth and Eighth Circuits hold that such statements can be the basis of a violation of the Sherman Act. Pet. at 1.

The Third Circuit did not say that in a Section 1 case intentional false statements may never provide the "restraint of trade" element of the Sherman Act. What the Court of Appeals stated was that in a Section 1 case, relying upon the specific language which that section provides, restraint of trade is pivotal. The Third Circuit went on to rule that that even false criticism of a competitor's product communicated to consumers, unaccompanied by coercion or some type of enforcement device, does not amount to a restraint of trade in violation of Section 1. Pet. App. at 13a-14a.

The Third Circuit declared that when the alleged excluding conduct leaves the consumer with no input from a competitor, there may be a "restraint of trade." However, here, as the Third Circuit noted, because Petitioner was at all times free to sell consumers its product; and consumers

were at all times free to accept or reject Respondents' criticism of Petitioner's product, Section 1 is not implicated. *Id.* at 14a-16a.

All the cases Petitioner claims are in "deep" conflict with the Third Circuit's decision involved something more than mere product disparagement to consumers. Either the challenged conduct was different from, or in addition to, intentionally false product disparagement, or the conduct was aimed not at consumers but at persons who had the ability to limit supply of the product in the marketplace to consumers. By contrast, the Third Circuit's decision here concerns product disparagement directly to consumers without any enforcement device or coercion to restrict or impede consumer choice.

A. Microsoft

The first case relied upon by Petitioner in its efforts to show a deep conflict is *United States v. Microsoft Corp*, 253 F.3d 34 (D.C. Cir. 2001), *reh'g denied*, 2001 U.S. App. LEXIS 17137 (D.C. Cir. Aug. 2, 2001), *cert. denied*, 534 U.S. 952 (2001). The alleged deception in that case was aimed not at consumers, as here, but at software programmers who provided the software to the consumer. Consumers were not free to decide for themselves which product to choose; choice was eliminated by Microsoft's deception. That elimination of choice distinguishes *Microsoft* from the present case.

The antitrust claim in *Microsoft* was also brought under Section 2 of the Sherman Act and involved a broad-based pattern of exclusionary conduct, only one part of which consisted of intentional deception. Unlike the present case, that deception did not involve product disparagement made to consumers. Instead, Microsoft deliberately deceived Java software programmers by representing that

Java programming tools provided by Microsoft would allow the programmers to develop Java programs compatible with multiple platforms. However, those programming tools were, in fact, Windows-specific and were not compatible with non-Windows operating systems. Through its campaign of deception, Microsoft intended to thwart efforts to develop "cross-platform capability," the chief reason for choosing the Java operating system over Microsoft's Windows. Therefore, consumers were not free to decide for themselves which product to use; their choice was eliminated by virtue of Microsoft's deception. Unlike here, consumers were constrained to buy Microsoft's operating system because Microsoft's deception had effectively eliminated a competitor's product from the marketplace.

B. Conwood

Conwood Co. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002), *reh'g en banc denied*, 2002 U.S. App. LEXIS 14731 (6th Cir. July 19, 2002), *cert. denied*, 537 U.S. 1148 (2003) also involved a broad-based pattern of exclusionary conduct, only one portion of which involved false statements, and the plaintiff there alleged only a claim under Section 2 of the Sherman Act. There, representatives of the defendant company systematically removed and destroyed racks containing the plaintiff's competing product from retailers' stores and provided "skewed" national sales figures to retailers to convince them to carry the defendant's poor selling items and to remove competitors' products from their store shelves. These anticompetitive efforts were particularly effective because the defendant's large market share enabled it to assume the role of "category manager" for many retailers who relied upon the category manager to supply recommendations on which items to stock, consumer information, sales, and which stores were stocking what items. The false statements in *Conwood* involved not product disparagement made to consumers, but false sales

information provided to retailers. As the result of the deception of retailers, the plaintiff's competing product was eliminated from retailers' shelves, and the consumer was thereby denied a meaningful choice of product. Thus, as in *Microsoft*, supply was restricted, and the consumer was constrained to purchase the defendant's product because there was only one product to choose.

Moreover, the Sixth Circuit revisited *Conwood* in *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc.*, 323 F.3d 366 (6th Cir. 2003), *reh'g en banc denied*, 2003 U.S. App. LEXIS 11147 (6th Cir. May 8, 2003). That case involved a product disparagement claim under Section 2 of the Sherman Act. It demonstrates convincingly that the cases cited by Petitioner as being in deep conflict are distinguishable on their facts and not in conflict with the Third Circuit's decision or the decisions of the Fifth and Seventh Circuits relied upon by the Third Circuit. The issue in *American Council* was whether three mass mailings from the defendant association to hospitals and insurance companies extolling the virtues of the defendant and criticizing its rivals violated Section 2 of the Sherman Act. In affirming the district court's grant of summary judgment to the defendant as to the antitrust claim, the Sixth Circuit applied the *de minimis* presumption set forth in the Second Circuit's decision in *National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, 850 F.2d 904 (2d Cir. 1988) discussed *infra* and the Ninth Circuit's decision in *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 108 F.3d 1147 (9th Cir. 1997).

As did the Third Circuit, the Sixth Circuit relied upon Judge Easterbrook's decision in *Schachar*, observing that the letters constituted mere advocacy and that the defendant association possessed no ability to enforce standards. The Sixth Circuit reasoned that without some

form of enforcement device, such as that in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), *reh'g denied*, 458 U.S. 1116 (1982), the defendant association had no ability to use the standards of the association to harm rivals and there could be no violation of the Sherman Act. *American Council*, 323 F.3d at 373. Observing that isolated business torts such as product disparagement seldom rise to the level of a Section 2 violation unless there is harm to competition itself, the Sixth Circuit distinguished its own prior decision in *Conwood* by noting that that case "involved a broad pattern of anticompetitive activities, and the complaint did not rest primarily on misleading statements." *Id.* at 374 n.11. Petitioner did not cite to *American Council* despite its important discussion of *Conwood*. That the Sixth Circuit, when confronted with a claim of product disparagement under the Sherman Act, could so readily distinguish its own prior decision in *Conwood* while relying upon both the Second Circuit's decision in *National* and the Seventh Circuit's decision in *Schachar*, demonstrates that those decisions, as well as the Third Circuit's decision, are entirely consistent and not in conflict, contrary to Petitioner's assertion.

C. National Association of Pharmaceutical Manufacturers

The challenged conduct in *National Association of Pharmaceutical Manufacturers, Inc.*, 850 F.2d 904 (2d Cir. 1988), consisted of a letter sent to pharmacists by the defendant manufacturer of a drug approved by the FDA for the treatment of patients who had suffered heart attacks. The letter urged pharmacists not to dispense generic drugs to consumers in place of the defendant's product and warned of possible legal liability for dispensing generic alternatives. The FDA determined that the letter was false and misleading and constituted an attempt to intimidate

pharmacists from dispensing generic alternatives instead of defendant's product. A generic drug manufacturer, together with an association which represented generic drug manufacturers, filed suit against the defendant alleging, *inter alia*, monopolization under Section 2 of the Sherman Act. In reversing the district court's dismissal of the monopolization claim, the Second Circuit held that a plaintiff asserting a monopolization claim based upon misleading advertising must "overcome a presumption that the effect on competition of such a practice was *de minimis*." 850 F.2d at 916 (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)). Expressing skepticism that the plaintiff would ultimately be able to overcome that presumption, the Second Circuit held, nevertheless, that the plaintiff should be given the opportunity to undertake discovery to substantiate its claim.

The Second Circuit's statement in *National* in no way conflicts with the Third Circuit's decision in this case. First, as in *Microsoft* and *Conwood*, the false statements in *National* were made not to consumers but rather to an intermediary supplier. To the extent that the defendant's intimidation or deception was successful and pharmacists refused to dispense generic drugs for treatment of post heart attack patients, consumers were denied the choice of a less expensive alternative drug and were compelled to purchase the defendant's product. Thus, demand for a generic alternative was not suppressed; rather supply was restricted.

Furthermore, there is no inconsistency between the Third Circuit's ruling that intentional product disparagement to consumers is not a restraint of trade and the Second Circuit's decision that misleading advertising presumptively fails to affect competition. The slight conceptual difference between a holding that disparagement

is *never* actionable because there is no restraint of trade and a holding that false advertising is *presumptively not* actionable because there is no effect on competition involves no significant conflict worthy of this Court's attention.

D. Travel Arrangers

In *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980), the challenged conduct involved not only false advertising communicated to consumers, but also disparaging statements and threats of retaliation made to travel agents. In that case, the only Sherman Act Section 1 case that Petitioner claims is in conflict with the Third Circuit's decision, Western Airlines, a regularly-scheduled airline, engaged in a pervasive "campaign" in concert with its advertising agency to prevent travel group charters from becoming a competitive threat. As part of this campaign, defendants not only placed false, misleading and deceptive newspaper and radio advertisements discrediting travel group charters, but also sent letters to travel agents referencing the false and misleading newspaper advertisements in an attempt to discourage travel agents from participating in travel group charters. Western Airlines also contacted the Minnesota State Automobile Association ("MSAA"), which served as a wholesaler and retailer for the travel group charters and handled the reservations and also bookings for those charters. Significantly, Western Airlines made veiled threats to reduce MSAA's preferred allocations in popular promotional group fares of Western Airlines. By virtue of these threats, Western Airlines induced MSAA to cancel plaintiffs' participation in the travel group charters. The Sixth Circuit in *American Council* also distinguished *Travel Arrangers* as involving a "much greater pattern of practice," including attempts to persuade travel agents to stop dealing

with a rival and threats to retaliate against them. 423 F.3d at 371.

Critical to an understanding of the Eighth Circuit's holding in *Travel Arrangers* is that the challenged conduct there was directed not only to the public but to travel agents, who, in the days before consumers could book their own flights via the internet, were more influential in directing consumers' travel decisions than they are today. Also, given the pivotal role played by MSAA in the success of travel group charters, the threats of coercion made by Western Airlines to MSAA to sever its ties with travel group charters is far different than any of the challenged conduct here. By influencing travel agents not to use travel group charters and by eliminating MSAA as a participant in group travel charters, defendants in *Travel Arrangers* not only suppressed demand, they also effectively restricted the choices available to consumers and restricted supply.[3] Thus, unlike the conduct ascribed to Respondents in this case, the anticompetitive conduct in *Travel Arrangers* did, in fact, restrain trade.

---

[3] Significantly, the Eighth Circuit's decision in *Travel Arrangers* pre-dated the 1988 Lanham Act amendments establishing the claim of unfair competition for false advertising. 15 U.S.C. § 1125(a). It is not unreasonable to believe that if that case were brought today, the Section 1 claim either would not have been asserted in favor of a Lanham Act claim or would have been dismissed prior to trial under the ruling of *Schachar* or the *de minimis* presumption of no harm to competition under *National*.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING ANY PERCEIVED SPLIT AMONG THE CIRCUITS

In opposing Respondents' motions for summary judgment, Petitioner abandoned any claim under the Rule of Reason and asserted that Respondents' conduct constituted a *per se* violation of Section 1 of the Sherman Act. *See* Pet. App. at 119a n.46. *See also id.* at 104a-109a. Thus, in order to prevail in this matter, Petitioner must establish that intentional false disparagement of a competitor's product constitutes a *per se* violation of the Sherman Act. Petitioner's evidence falls far short of showing any restraint of trade, as the Third Circuit ruled.

This Court has admonished that *per se* treatment is appropriate only where the purpose and effect of the challenged conduct threaten the proper operation of a free market economy or where the "practice facially appears to be one that would always or almost always tend to restrict competition and restrict output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979). *Per se* treatment is only appropriate "once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). "Where the economic impact of certain practices is not immediately obvious," the *per se* rule should not be applied. *Khan, supra.* To date, no court has condemned intentional false disparagement as worthy of *per se* treatment; indeed, no court has held that a pure intentionally false product disparagement claim, unaccompanied by coercion or some enforcement device, even violates the Rule of Reason. This is especially understandable where, as here, the economic impact of the challenged practices is far from obvious and the record is devoid of any economic experience or even expert testimony

to demonstrate that impact.[4] Accordingly, this case is a poor vehicle to adopt a *per se* standard for an intentional product disparagement claim under the Sherman Act.

Contrary to Petitioner's assertions, even if the Court were to conclude that the Third Circuit's decision was in conflict with the *de minimis* doctrine adopted by the Second Circuit in *National* and the Sixth Circuit in *American Council*, this case is not the proper vehicle to resolve that conflict because Petitioner also failed to overcome the *de minimis* presumption and failed to establish harm to competition. In granting summary judgment to defendants on the antitrust claim, Chief Judge Vanaskie held that Petitioner had also failed to overcome the presumption of no harm to competition. *See* Pet. App. at 119a-120a n.47. Thus, even a favorable resolution of any perceived conflict between the *de minimis* doctrine and the Third Circuit's decision affords Petitioner no meaningful relief in this case and prolongs the inevitable dismissal of Petitioner's antitrust claim on remand. The District Court also concluded that all Petitioner's claims concerning the mostly public contracts at issue were barred by the *Noerr-Pennington* doctrine because they involved promotional campaigns aimed at governmental purchasers, making Respondents immune from antitrust or other scrutiny, even though intentionally false or fraudulent. *See* Pet. App. at 50a-77a. In affirming summary judgment for Respondents on the antitrust claims, the Third Circuit did not reach this largely dispositive issue. *See* Pet. App. at 11a-13a n.13 and n.14.

---

[4] Petitioner voluntarily withdrew all of its expert opinions for purposes of summary judgment after Respondents filed expert preclusion motions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Pet. App. at 117a n.45.

Finally, this case is a poor vehicle to resolve any claimed conflict in the Circuits because the facts of this case do not raise antitrust concerns. Petitioner's characterization of the facts of this case as showing a restraint of trade is unsupported by the record.[5]

- First, Petitioner claims that its proffered evidence showed that, as a result of Respondents' conduct, architects "largely ceased" specifying HDPE. *See* Pet. at 4. Petitioner's conclusory Statement of Material Facts is not evidentiary and itself cites only to a declaration of one of its employees. That declaration makes no claim that architects "largely ceased" specifying HDPE. *See* C.A. App. at 203-05. The record is replete with evidence to the contrary, including correspondence with architects and specifiers regarding the specification of HDPE. *See, e.g., id.* at 6374-75, 6377, 6379, 6381, 6383, 6385, 6387-88, 6390. Petitioner's sales increased during the relevant time period. *See* C.A. App. at 11675-76. Petitioner's expert report shows a 61% increase in HDPE sales by Petitioner between 1989 and 1997. *See* Pet. App. at 117a n. 45 (District Court Opinion); C.A. App. at 10984, 10994 (Petitioner's expert report).

- Second, Petitioner claims that rapid gains in market share of manufacturers of HDPE partitions "abruptly stopped" as a result of Respondents' conduct. *See* Pet. at 4. Petitioner's cited chart of its net sales, *see* C.A. App. at 11675-76, neither establishes nor addresses the

---

[5] Petitioner never made the factual assertions now contained in its Petition in its voluminous papers filed with either the District Court or the Court of Appeals. *See* C.A. App. at 9241-9293; 9385-9478.

market share of either Petitioner or HDPE partition manufacturers generally.[6]

- Third, Petitioner claims the alleged conspirators subsequently regained the market share they had lost to HDPE manufacturers after the alleged conspiracy began in 1989. *See* Pet. at 4. Much of the cited material says nothing about market share at all. *See* C.A. App. at 202-05, 2667-69, 9421-22, 9476-78. The cited materials that even address market share relate only to a single moment in time, and therefore do not show any gain or loss of market share. *See* C.A. App. at 11620, 11656. The District Court stated that the record contained "no evidence that the HDPE share of the market declined during the period 1989 through 1996. In fact, it appears that the HDPE share of the toilet partition market increased during the 1990's. ... [Petitioner] has not shown ... that its share of the market declined from the pre-conspiracy period." *See* Pet. App. at 107a-108a n.41. In view of the fact that the relevant product market as defined by Petitioner was all toilet partitions, not merely HDPE partitions, *see* C.A. App. at 11385-11387 and Plaintiff's Complaint at ¶¶ 69 and 72, there were no facts presented that overall production of toilet partitions in the U.S. decreased or was restricted in any way. *See* Pet. App. at 118a-119a. Nor were there any facts adduced that the production of HDPE toilet partitions was reduced. *See id.* On the contrary, Petitioner and Capitol Partitions, which also produced HDPE partitions, each increased its sales of HDPE partitions by more than 60% between 1989 and 1997. *See id.; see also* C.A. App. at 7817-7819, 10994, 11037-11038, 11675-11676.

---

[6] The chart shows increases in Petitioner's net sales in every year except 1991. *See* C.A. App. at 11675-11676.

- Fourth, Petitioner claims that "[t]hree small manufacturers of HDPE partitions exited the industry." *See* Pet. at 4. The District Court noted that while three small manufacturers of HDPE toilet partitions discontinued their sales of HDPE toilet partitions, they remained in the toilet partition market and competed against HDPE partitions. *See* Pet. App. at 106a n.40 and 107a-108a. The District Court also stated that Compression Polymers, which had sold HDPE panels to those three companies, entered the toilet partition market with HDPE compartments through its subsidiary, Sanatec Industries, now known as Comtec. *See* Pet. App. at 106a n.40. As the District Court ruled, the withdrawal of the three manufacturers from the HDPE toilet partition market was compensated for by the entry of Comtec. *See* Pet. App. at 117a-119a; C.A. App. at 3844-3845, 3919-3923, 6322.

- Fifth, Petitioner claims that following the filing of its 1994 lawsuit, in which Respondents were not named as defendants, "several" alleged conspirators began selling HDPE toilet partitions, and HDPE partitions then "resumed their upward growth trend in market share at the expense of conventional partitions." *See* Pet. at 5. Petitioner's cited evidence establishes that two alleged conspirators advertised and offered for sale HDPE toilet partitions in 1995, but does not support Petitioner's broad claim. *See* C.A. App. at 11675-76.[7]

- Sixth and finally, Petitioner claims that the alleged conspirators subsequently increased the prices for their own products after the alleged conspiracy was commenced in 1989. *See* Pet. at 4. The material cited establishes only that Petitioner's product was historically priced lower than Bobrick's product, not that there was a

---

[7] *See* n.6, supra.

successful price increase as a result of the conspiracy. *See* C.A. App. at 870-72; 2724; 9367; 9434-35.

IV. THE THIRD CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THE ANTITRUST POSITION OF THE UNITED STATES

Petitioner's claim that the Third Circuit's holding conflicts with the antitrust position of the United States is likewise devoid of merit. Tellingly, no governmental entity has chosen to investigate any of the conduct alleged in this highly-publicized litigation since it commenced in 1996 (or even in the earlier 1994 litigation), or to weigh in at the district court or court of appeals.

Foremost, the Third Circuit did not hold that intentionally false statements about a competitor can never support a Sherman Act violation. As a result, despite Petitioner's best efforts to manufacture a conflict, to the extent that the United States has argued elsewhere that such statements may be actionable under the Sherman Act, there is none.

Moreover, Petitioner's claim is contradicted by the positions taken by the United States in numerous cases, including three antitrust cases before the Court this term. For decades, and as recently as last month, the position of the United States has been to limit unnecessary and inappropriate broadening of the scope of the antitrust laws, so as not to interfere with procompetitive conduct.

This Court granted *certiorari* in three antitrust cases for this term.[8] In all three, the United States joined with

---

[8] *See Texaco, Inc. v. Dagher*, Nos. 04-805 and 04-814; *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905; *Illinois Tool Works v. Independent Ink*, No. 04-1329.

Petitioners in arguing that the antitrust laws should not be expanded to cover allegedly actionable conduct or make such conduct *per se* illegal.[9] These cases are not anomalous. Both the Department of Justice and the Federal Trade Commission have repeatedly taken similar positions.[10]

---

[9] *See* Brief for the United States as Amicus Curiae Supporting Petitioners in *Texaco, Inc. v. Dagher*, Nos. 04-805 and 04-814, dated September 2005 (arguing that appellate court erred in holding that petitioners may have committed a *per se* violation of Section 1 of the Sherman Act by agreeing to unify the prices for the two brands of gasoline produced and sold by their lawful joint ventures); Brief for the United States as Amicus Curiae in *Illinois Tool Works v. Independent Ink*, No. 04-1329, dated August 2005 (arguing against a rebuttable presumption that a patent confers market power in patent tying cases); Brief for the United States as Amicus Curiae Supporting Petition, dated May 20, 2005, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 2004 U.S. Briefs 905 (arguing that the lower court was improperly expanding the Robinson-Patman Act to proscribe procompetitive conduct that increased interbrand competition).

[10] *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae in *Empagran, S.A. v. F. Hoffmann-LaRoche, Ltd.*, No. 01-7115, dated February 16, 2005 in the Court of Appeals for the District of Columbia Circuit (opposing an overly broad reading of the Sherman Act, emphasizing at page 5 the Congressional intent "not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.") (emphasis in original); Brief for the United States and Federal Trade Commission as Amici Curiae in *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, No. 99-905, dated June 2000 (opposing *certiorari* following a ruling that even if a defendant provides deliberately false information to the government or its agents, the *Noerr-Pennington* Doctrine immunizes that conduct from antitrust liability); Brief for the United States and the Federal Trade Commission as Amici Curiae in *State Oil Co. v. Khan*, No. 96-871, dated April, 1997 (supporting reversal of a holding that a vertical maximum price fixing conspiracy was a *per se* violation of Section 1 of the Sherman Act).

Petitioner claims, "For decades, the United States has taken the position that false statements about a competitor may support a [*per se*] Sherman Act violation." *See* Pet. at 21. The few authorities Petitioner cites in its Petition at 21-23 are all distinguishable.

Both the Opinion of this Court in *Walker Process Equip. Co. v. Food* Mach. & *Chem. Corp.*, 382 U.S. 172 (1965) and the Brief of the United States as amicus curiae in that case are distinguishable because *Walker Process* involved unilateral fraud on the Patent Office, where there was no opportunity for the opposition to learn of and correct misstatements. Here, by contrast, it is undisputed that both parties had ample opportunity to learn of and correct misstatements, and, in fact, did so in the economic marketplace. *See* C.A. App. at 6374-75, 6377, 6379, 6381, 6383, 6385, 6387-88, 6390. As the Third Circuit stated, "This is classic competition on the merits of a product." *See* Pet. App. at 14a-15a.

The cited Brief of the Department of Justice filed as amicus curiae in *Massachusetts School of Law at Andover, Inc. v. American Bar Association* addressed Constitutional protections and First Amendment immunity that are not at issue in this Petition. 1996 WL 33420204 (3d Cir. Oct. 28, 1996). Because those issues were not decided by the Third Circuit, they are not before this Court, and there is no conflict between the holding in this case and the government's position there.

The cited Brief of the United States in *United States v. Microsoft Corp.* likewise presents no support for Petitioner's position here. There, amidst numerous and varied forms of unlawful conduct, the United States argued that the district court had correctly concluded that Microsoft's deceptive design of Java development tools led developers to write applications that would run only on Windows could not be

"described as competition on the merits and did not benefit consumers." Brief of the United States as Appellee, 2001 WL 34135295 at 63 (D.C. Cir. Jan. 12. 2001). Nowhere did the United States argue that a false statement alone would be actionable as a *per se* violation of the Sherman Act. To the contrary, the deceptive conduct at issue in *Microsoft* was one float in a parade of horribles, not the whole parade. Because Microsoft's deceptive design interfered with the use of Java development tools on non-Windows systems, it interfered with a free market and harmed competition in a fundamentally different and far more pervasive and pernicious sense than an allegedly false statement about a competitor's product made in a marketing context. In the latter example, prior to purchase, the consumer can investigate further, and the maligned competitor can respond and correct the misstatement, whereas in the former scenario, the harm goes undiscovered until long after the product (development tool) has been purchased and used. By that time, the consumer has been denied a choice, and trade has been restrained.

V. THE THIRD CIRCUIT CONSIDERED PETITIONER'S ALLEGATIONS AS A WHOLE IN AFFIRMING THE DETERMINATION THAT PLAINTIFF COULD NOT ESTABLISH A RESTRAINT OF TRADE SUFFICIENT TO SUPPORT ANTITRUST LIABILITY

The Third Circuit's analysis of Petitioner's claims complied in all material respects with *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962) because it did, in fact, consider the Respondents' marketing campaign against HDPE partitions in the context of the other conduct alleged in support of Petitioner's Section 1 claim, and adopted the District Court's view that the additional conduct could not support antitrust liability. *See* Pet. App. at 8a, 13a-14a. The Third Circuit reviewed all

aspects of the conspiracy alleged by Petitioner – *i.e.*, not only the marketing and information campaign, but also the decision of three conspirators to stop selling HDPE partitions, and the allegation that Respondents' actions reduced the number of HDPE compartment specifications for which Petitioner could bid. *See* Pet. App. at 13a. It summarized Petitioner's theory of liability, noting that Petitioner argued that Bobrick and the members of the TPMC created a restraint of trade by means of a group boycott under which Bobrick and the members of the TPMC conspired to agree upon a single product standard to exclude HDPE. *Id.* After reviewing these allegations, however, the Third Circuit agreed with the District Court's conclusion that the meager evidence offered by Petitioner after three years of discovery did not amount to a sufficient restraint of trade to warrant antitrust liability. *See* Pet. App. at 13a-14a.

The Third Circuit's concise but thorough treatment of Petitioner's full range of allegations is a far cry from the minimal analysis which this Court condemned in *Continental Ore*. The Third Circuit, as did the District Court, considered all the conduct Petitioner alleged had constituted illegal activity, but concluded no "restraint" could be found in all of this combined activity. This analysis comports with this Court's guidelines in *Continental Ore*.

CONCLUSION

For all the above reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

CARL W. HITTINGER
Counsel of Record
DONALD E. WIEAND, JR.,
SUZANNE M. MCSORLEY
NEIL C. SCHUR
EUGENE V. LIPKOWITZ
STEVENS & LEE, P.C.
1818 Market Street
29th Floor
Philadelphia, PA 19103-1702
(215) 751-1946

October 20, 2005

NO. 05-185

Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SANTANA PRODUCTS, INC.,

Petitioner,

v.

BOBRICK WASHROOM EQUIPMENT, INC., BOBRICK CORPORATION, HORNYAK GROUP, INC. and VOGEL SALES COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS HORNYAK GROUP, INC. AND VOGELS SALES COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER F. CASPER, JR.
Counsel of Record
35 South Church Street and
7th Avenue
Carbondale, PA 18407
(570) 282-6910

October 20, 2005

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

REVISED QUESTIONS PRESENTED

The questions presented are:

1. Whether concerted use of intentionally false statements about a competitor's product is a *per se* violation of Section 1 of the Sherman Act where there is no showing of any restraint of trade.

2. Whether an opinion that a concerted use of intentionally false statements, without a showing of any restraint of trade, is not a *per se* violation of Section 1 of the Sherman Act, conflicts with the opinions of other circuit courts or the position of the United States.

LIST OF PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The names of all parties in the court of appeals are: Petitioner Santana Products, Inc. and Respondents Bobrick Washroom Equipment, Inc., The Bobrick Corporation, The Hornyak Group, Inc., and Vogel Sales Company.

The Hornyak Group, Inc. is not publicly traded and has no parent company or subsidiary, and no publicly owned company owns more than 10% of its stock.

Vogel Sales Company is not publicly traded and has no parent company or subsidiary, and no publicly owned company owns more than 10% of its stock.

TABLE OF CONTENTS

PAGE

REVISED QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 9

CONCLUSION 12

TABLE OF AUTHORITIES

PAGE(S)

CASES

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,
441 U.S. 1 (1979) 10

Continental Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) 11

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752, 81 L. Ed. 2d 628,
104 S. Ct. 2731 (1984) 8

Peerless Heater Co. v. Mestek, Inc.,
2000 U.S. Dist. LEXIS 6664,
No. Civ. A. 98-CV-6523,
2000 WL 637082 (E.D. Pa. May 11, 2000) 6

Siegel Transfer, Inc. v. Carrier Express, Inc.,
54 F.3d 1125 (3d Cir. 1995) 8

Stearns Airport Equipment Co. v. FMC Corp.,
170 F. 3d 518 (5th Cir. 1999) 9, 10

STATUTES

15 U.S.C. § 1 ..... *passim*

15 U.S.C. § 2 5

15 U.S.C. § 5 10

15 U.S.C. § 1125(a) 5, 10

OTHER MATERIALS

Brief for the United States as Amicus Curiae, *Illinois Tool Works v. Independent Ink*, No. 0-1329 (August 2005).....11

Brief for the United States as Amicus Curiae, *Texaco, Inc. v. Dagher*, Nos. 04-805 and 04-814 (September 2005).....11

Brief for the United States as Amicus Curiae Supporting Petition, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 2004 U.S. Briefs 905.....11

INTRODUCTION

Respondents The Hornyak Group, Inc. ("Hornyak") and Vogel Sales Company ("Vogel") respectfully request, for the reasons set forth herein, that this Court deny the petition for writ of *certiorari*, seeking review of the Judgment and Opinion of the Court of Appeals for the Third Circuit, dated February 9, 2005.

COUNTER-STATEMENT OF THE CASE

In the early 1980s, Petitioner Santana Products, Inc. ("Petitioner") introduced high density polyethylene ("HDPE") toilet partitions as an alternative to conventional metal and wood partitions. *See* Pet. App. at 38a. It advertised these solid plastic partitions as vandal resistant and falsely claimed they met applicable building safety codes. *See* Pet. App. at 38a-43a. Petitioner also falsely claimed that it sold a Class A fire-rated HDPE toilet partition. *See id.* Petitioner's HDPE partitions competed in the primarily public toilet partition market against Bobrick Washroom Equipment, Inc. ("Bobrick"), which manufactures toilet partitions made of either solid phenolic or particle board covered on each side with laminated plastic. *See* Pet. App. at 39a. Some of Bobrick's toilet partitions are Class A fire-rated and meet flame spread and smoked developed indices under applicable building safety codes. *See id.* Hornyak and Vogel were independent architectural representatives of Bobrick who sold toilet partitions in exclusive territories in Pennsylvania, New Jersey, West Virginia, Maryland and Delaware.

The specification process for public building contracts affects the toilet partition industry because toilet partitions are installed only in non-residential restroom facilities. Bidding on a public building contract is a two-part process. The focus of this litigation is on the first part: specification. *See* Pet. App. at 37a.

In that process, prior to competitive bidding on price, the owner or its designee (*i.e.*, the architect or "specifier") on a building project writes specifications for the materials to be used. Once the specifications are finalized, companies whose products satisfy the specifications may bid on the project. Thus, the toilet partition suppliers, mostly through their independent architectural representatives, lobby customer architects and specifiers for primarily public building projects to specify their product or not to specify a competitor's product. Prior to specification, the companies compete on such grounds as durability, resistance to vandalism, ease of installation, aesthetics and compliance with applicable building codes. After specification, competitors whose products satisfy the specifications compete on price. *See* Pet. App. at 37a.

In the construction industry, materials are often tested for flammability before use in public buildings. One common flammability test is the American Standard Test Methods ("ASTM") E-84 Test. Some building codes and the National Fire Protection Association's ("NFPA") Life Safety Code 101 use the indices generated by the ASTM E-84 test to determine a material's "fire rating." The following rating system is the subject of this dispute: a Class A fire rating is the highest fire rating, requiring a flame spread index of 0-25; Class B, the next highest rating, requires a flame spread index between 26 and 75; finally, Class C fire rating requires a flame spread rating between 76 and 200. All three classes require a "smoke developed" index of less than 450. Any product that falls below the Class C fire rating is considered unrated. *See* Pet. App. at 41a.

In the early 1980s, Petitioner began to develop a fire-rated toilet partition, using the ASTM E-84 test to measure the fire rating of its test panels. This effort led to the 3000 Series toilet partition (also called the "FR" partition by

Petitioner), which Petitioner advertised as meeting a Class A rating. One of Petitioner's brochures stated that only its FR partition met or exceeded "mandatory building code requirements for flame spread, smoke generation, and toxicity. These requirements were established and are currently enforced by the NFPA, BOCA, and other federal, state, and local municipality safety agencies nationwide." *See* C.A. App. at 3592-93.[1] The reverse side of the brochure contained proposed specifications, which specified a fire-rated toilet partition made by Petitioner and referenced the ASTM E-84 test. *Id.* A description of the FR partition and its fire rating was included in at least one of Petitioner's advertisements as well.[2]

However, Petitioner experienced increasing quality problems with its FR product, which was difficult to produce and lost most of the benefits of HDPE. Specifically, the FR material was brittle and heavy, any cuts and scratches thereto were difficult to fix, the color choices were limited, and the product was expensive, plagued by delivery delays, less resistant to graffiti, and yielded inconsistent fire rating test results and inconsistent color by batch.[3]

---

[1] "BOCA" refers to Building Officials and Code Administrators International, Inc.

[2] *See* C.A. App. at 4125-32; *see also id. at* 3573, 3790-91, 3792-93, 3779-81, 4312-19, 3789, 4355-69, 3962-63; *see also* Pet. App. at 42a-43a, 131a-132a.

[3] *See* C.A. App. at 3112-14, 3116, 3128-30, 3447-50, 3452-53, 3454-55, 3582-86, 3700-01, 3736-38, 3743-44, 3810-11, 3821, 3836-39, 3985, 3987, 3989, 3991-4059, 4061, 4063, 4065-67, 4069, 4071, 4073-74, 4076-88, 4090-95, 4097-4104, 4106-07, 4109, 4112-13, 4116, 4121-22; *see also* Pet. App. at 43a.

Most importantly, Petitioner's FR partition varied in its fire rating. It is undisputed that by the 1990s, Petitioner was phasing out its Class A product in favor of its standard, non-rated product, Poly-Mar HD, in order to, as its National Sales Manager stated, "reverse the process" Petitioner itself had started for specification of fire-rated products. *See* C.A. App. at 6188-6192; *see also* Pet. App. at 42a-43a, 131a-132a, 161a.

In response to Petitioner's false marketing campaign regarding its fire-rated product, and the claimed ability of its other HDPE partitions to meet the requirements of applicable building codes, Bobrick received in 1990 a copy of a videotape created by phenolic manufacturer Formica that showed the flammability of HDPE toilet partitions and, with Formica's permission, sent copies to various of Bobrick's independent architectural representatives. *See* Pet. App. at 45a-46a. Bobrick also distributed to customers a "Technical Bulletin" ("TB-73") that provided a comparison of the different results of an ASTM E-84 test performed on Bobrick's 1080 DuraLine Series partitions and on HDPE partitions. *See* Pet. App. at 46a. The TB-73 bulletin was included in Bobrick's Architectural Manual from 1990 to at least 1994. *See id.*

In 1992-1993, in further response to Petitioner's false advertising, Bobrick also produced its own videotape, entitled "You Be The Judge," that included a side-by-side comparison of fire tests performed on solid phenolic and HDPE bathroom stalls. *See* Pet. App. at 46a. Some Bobrick independent representatives, also conducted live demonstrations of burning samples of HDPE for architects and specifiers, and Bobrick placed advertisements in the American School & University magazine ("AS&U") in the early 1990s that described HDPE as a "fire hazard" that "far exceeds the maximum allowable smoke contribution standard of the National Fire Protection Association Life

Safety Code ... according to a recent ASTM E-84 test ...." *See* Pet. App. at 47a. Finally, Bobrick created slide presentations and sales scripts for its representatives that compared HDPE to solid phenolic core partitions, in additional response to Petitioner's own misleading advertising regarding flammability and fire ratings. *See* Pet. App. 46a-47a. Petitioner responded to Respondents' marketing campaign with its own counter campaign, that in many cases proved successful. *See* Pet. App. at 118a-120a n.47; *see also* C.A. App. at 3772-73, 5513-14, 5626-27, 6094.

Petitioner's Complaint, filed in 1996, stated four claims against Respondents: (i) violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; (ii) violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2; (iii) violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); and (iv) tortious interference with prospective advantage.

On November 13, 2000, following nearly three years of costly discovery, Hornyak and Vogel moved for summary judgment on all claims against them.

The District Court dismissed all of Petitioner's claims against Hornyak and Vogel on the basis of the *Noerr-Pennington* Doctrine:

> Co-defendants Hornyak and Vogel also moved for summary judgment on the basis of the *Noerr/Pennington* doctrine. Both Hornyak and Vogel presented evidence that their sales activity were directed exclusively at public entities. Santana did not dispute this characterization of the evidence. Indeed, Santana's opposition brief does not address the applicability of the *Noerr/Pennington* doctrine to the alleged actions of Hornyak